

ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In The Matter of

**McLeodUSA Telecommunications
Services, Inc.**

**Petition For Preemption of Nebraska Public
Service Commission Decisions Permitting
Withdrawal of Centrex Plus Service by
U S WEST Communications, Inc.**

CC Docket No. 98-84

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to *Public Notice*, DA 98-1099 (released June 10, 1998), hereby files the following comments in support of the Petition for Preemption, Declaratory Ruling, and Injunctive Relief ("Petition") filed by McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") in the captioned proceeding on May 29, 1998. In its Petition, McLeodUSA urges the Commission to issue a "declaratory ruling and accompanying injunction, ordering that the parts of the Order of the Public Service Commission of Nebraska dated November 25, 1996, Docket No. FC-1252, FC-1253 and FC-

¹ A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services.

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1254 which allow the withdrawal by U S WEST of Centrex Plus service, violate and are preempted by 47 U.S.C. § 251(c)(4)(B) and are therefore null and void."² TRA agrees with McLeodUSA that the referenced action by the Nebraska Public Service Commission ("Nebraska PSC") will have the "effect of prohibiting the ability of . . . [resale carriers] to provide [local exchange services to small businesses in the State of Nebraska]" and, therefore, violates the mandate of Section 253(a) of the Communications Act of 1934 ("Communications Act"), as amended by Section 101 of the Telecommunications Act of 1996 ("Telecommunications Act").³ TRA, accordingly, urges the Commission to expeditiously grant the McLeodUSA Petition, thwarting U S WEST's efforts to hinder resale competition within the State of Nebraska.

Recognizing the need to provide their customers with a full range of service offerings, TRA's resale carrier members have been in the vanguard of competitive providers seeking to enter the local telecommunications market. A year ago, a third of TRA's resale carrier members reported that they were providing, or attempting to provide, competitive local exchange service, while an additional third reported plans to enter the local market within twelve months.⁴ TRA's resale carrier members are currently providing, or attempting to provide, competitive local exchange service in 44 states. While the State of Nebraska is among these 44 states, only one TRA resale carrier member reported that it was providing, or attempting to provide, local service in Nebraska, which stands in sharp contrast to the nearly 40 states in which multiple TRA resale carrier members are

² McLeod Petition at 28.

³ 47 U.S.C. § 253; Pub. L. No. 104-104, 110 Stat. 56, § 101 (1996).

⁴ Telecommunications Resellers Association, "1997 Reseller Membership Survey and Statistics," pp. 1, 15 (October, 1997).

active at the local level.⁵ While roughly a third of TRA's resale carrier members are making some use of unbundled network elements in these states, the large majority are providing local exchange service exclusively or predominantly through resale.⁶

Congress designated resale as one of three coequal "paths of entry into the local market," requiring incumbent LECs to offer all retail telecommunications services for resale at wholesale rates.⁷ As the Commission has recognized, resale is "an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled network elements or by building their own networks."⁸ Accordingly, the Commission has committed not only to eliminate statutory and regulatory barriers to resale, but to remove economic and operational impediments to resale as well.⁹

⁵ Telecommunications Resellers Association, "Member Survey of Local Competition," pp. 2, 4 (April, 1998).

⁶ *Id.* at 5.

⁷ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 12 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd/vacated in part sub. nom. Iowa Util. Bd v. FCC*, 120 F.3d 753 (1997), *cert. granted sub. nom AT&T Corp. v. Iowa Util. Bd* (Nov. 17, 1997), *pet. for rev. pending sub. nom., Southwestern Bell Tel. Co. v. FCC*, Case No. 97-3389 (Sept. 5, 1997).

⁸ *Id.* at ¶ 907. While the telecommunications resale industry is a maturing market segment comprised of an eclectic mix of established, publicly-traded corporations, emerging, high-growth companies and newly-created enterprises, the "rank and file" of TRA's membership is still comprised of small to mid-sized carriers serving small to mid-sized businesses. The average TRA resale carrier member has been in business for five years, serves 10,000 customers, generates annual revenues of \$10 million and has in the neighborhood of 50 employees. Telecommunications Resellers Association, "1997 Reseller Membership Survey and Statistics" (October, 1997).

⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶¶ 12, 16.

Consistent with this commitment, the Commission has recognized that efforts by incumbent LECs to restrict resale constitute "evidence of market power" and reflect efforts by these monopoly providers "to preserve their market position."¹⁰ Indeed, in concluding that "resale restrictions are presumptively unreasonable," the Commission emphasized the "anticompetitive results" that such restrictions produce.¹¹ More directly pertinent here, the Commission has noted the "anticompetitive effects" that "the incumbent LECs' ability to withdraw service may have . . . where resellers are purchasing such services for resale in competition with the incumbent."¹²

While the Commission "left to state commissions" the initial determination of whether an incumbent LEC should be permitted to withdraw a service which is being resold by competitive providers, it made clear its expectation that State regulators would scrutinize the "implications" of any such withdrawal.¹³ Clearly, the Commission anticipated that, at a minimum, a State Commission would investigate the impact on resale competition of the withdrawal of a retail service by an incumbent LEC.¹⁴

Notwithstanding its election to leave service withdrawal issues to State Commissions, the Commission has recognized that Section 253 "obligates . . . [it] to remove any state or local legal mandate that 'prohibit[s] or has the effect of prohibiting' a firm from providing any interstate or

¹⁰ Id. at ¶ 939.

¹¹ Id.

¹² Id. at ¶ 968.

¹³ Id.

¹⁴ Id.

intrastate telecommunications service."¹⁵ Moreover, the Commission has acknowledged that Section 253 "commands . . . [it] to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service."¹⁶ In determining whether a state or local legal mandate is an "indirect, effective prohibition[]," the Commission has indicated that it will assess whether the mandate "materially inhibit[s] or limit[s] the ability of any competitor or potential competitor to compete."¹⁷

The Commission has further acknowledged that Section 253 must be read to "bar[] restrictions by state or localities on the means through which an entity may enter the local exchange market."¹⁸ As the Commission explained:

under our reading of section 253, an entity is free to choose whether to enter the market by using its own facilities, reselling the services of an incumbent LEC, obtaining incumbent LEC unbundled network elements or a combination of these options.¹⁹

Thus, the Commission has held that a state or local action which "restricts the ability of . . . [a competitor] to provide service to end users by reselling incumbent LEC services . . . violate[s]

¹⁵ Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995 (Memorandum Opinion and Order), 13 FCC Rcd. 3460, ¶ 22 (1997), *recon. pending*.

¹⁶ Id. As described by Congress, Section 253 was "intended to remove *all* barriers to entry in the provision of telecommunications services." Conference Report, Rep. No. 104-458, 104th Cong., 2d Sess. 126 (1996) (emphasis added).

¹⁷ Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995 (Memorandum Opinion and Order), 13 FCC Rcd. 3460 at ¶ 22.

¹⁸ Id. at ¶ 74.

¹⁹ Id. at ¶ 76.

section 253(a) of the Act."²⁰ Indeed, the Commission noted that such restrictions "must be preempted on the independent ground that they conflict with section 251(c)(4)(B) of the Act."²¹

Finally, in applying Section 253 to incumbent LEC restrictions on the resale of Centrex service, the Commission has ruled that to run afoul of Section 253(a), the restrictions need not "prohibit outright competing carriers from reselling . . . centrex services."²² Rather, the Commission determined that a violation of Section 253(a) occurs if the restriction "effectively precludes new entrants from providing competitive centrex service through resale."²³ As explained by the Commission, if competitors cannot operate "in the same manner in which they operate in other states" as a result of the restriction, the restriction will be deemed to "'ha[ve] the effect' of prohibiting the ability of any entity to provide a telecommunications service, *i.e.*, centrex service, through resale in violation of the provisions of section 253(a) of the Act standing alone."²⁴

As the Commission has acknowledged, "[c]entrex resale has become a thriving business in many states."²⁵ Centrex is a key resale vehicle for many of the TRA resale carrier members involved in the resale of local telecommunications services. Centrex is a feature-rich service which allows resale carriers flexible access to a variety of features and functions through which they can customize service for their end users.

²⁰ Id. at ¶ 77.

²¹ Id. at ¶ 91.

²² Id. at ¶ 220.

²³ Id.

²⁴ Id.

²⁵ Id.

As described by one incumbent LEC in touting in its resale carrier handbook a product line that would allow resale carriers to "serve all market segments," Centrex service is "a powerful, feature-rich engine with a wide assortment of call management features:"²⁶

Centrex service is a central office-based telecommunications system that provides telecommunications access lines and a wide range of call management features to the Reseller and its end-users. . . . This telecommunications system utilizes a complex, dedicated software block in a central office switch which defines the calling patterns, access and call management features for each line in the system.

The standard Centrex features that can be provided on all lines are: Billable Calls Itemized, Direct Outward Dialing, Call Forwarding II, Hunting, Call Forwarding -- Does Not Answer, Line Treatments, Call Forwarding - Variable, Station to Station Dialing, Call Hold, Three-way Conference Calling, Call Transfer - All Calls, Touch-tone, Direct Inward Dialing, Automatic Callback-Intragroup, Call Waiting Terminating, Distinctive Ringing, Directed Call Pick Up-With Barge In/Without Barge In, Speed Calling-Individual 30 Number List, Trunk Answer Any Line, and Call Pick Up Group(s).

Optional features available with Centrex include, but are not limited to the following: Authorization Codes, Account Codes, Automatic Route Selection (Basic) (Deluxe), Uniform Call Distribution, Tie Line Access, Carrier Access Ports (Dedicated Access), Station Message Detail Recording (Tape) (Premise), and Customer System Administration (Macstar) (CCRS).

Call management features not included in the standard and optional feature lists can be provisioned on Centrex lines. Call management features include, but are not limited to, PhoneSmart features (Caller ID, Repeat Dialing), Call Answering services for large business users, and Basic Rate ISDN.²⁷

²⁶ "Product Overview," NYNEX Resale Handbook Series, Volume. 1, Issue 1, Section 6, Page 1 (June 28, 1996).

²⁷ Id. at 6.

U S WEST does not disagree. Indeed, the carrier touts for end users many of the elements of Centrex service which make it an important resale vehicle for TRA's resale carrier members. Thus, for example, U S WEST declares that Centrex Plus "allows you to design your own telecommunications system, selecting the capabilities that meet employees' needs," without "expensive capital purchases everytime your company expands or a system upgrade is required."²⁸ Moreover, U S WEST notes that Centrex Plus can tie multiple locations into "a seamless network," incorporating "different parts of town, different cities or different states" so that "each location can access the same Centrex Plus features, as well as dedicated long distance services."²⁹

TRA agrees with McLeodUSA that the withdrawal of Centrex service significantly diminishes the viability of resale as an strategy for entering the local telecommunications market. Withdrawal of this service eliminates a cost-efficient means by which resale carriers can provide competitive service to small business users. To paraphrase the Commission, the withdrawal of Centrex service "materially inhibit[s] or limit[s] the ability of . . . competitor[s] . . . [and] potential competitor[s] to compete," denying them the ability to operate "in the same manner in which they operate in other states." Nebraska Commissioner Lowell C. Johnson had it right when he declared that U S WEST's withdrawal of Centrex service has had the effect of "imposing a barrier to the entry

²⁸ U S WEST Website, "for Small Business - Centrex Plus" & "for Large Business - Centrex Plus."

²⁹ Id.

of competitors into local exchange markets [in the State of Nebraska]" and "effectively circumvent[s] the 'resale' requirement of the Act."³⁰

As McLeodUSA points out, other state commissions in the US WEST region have seen through the carrier's machinations. For example, the Oregon Public Utilities Commission and the Iowa Utilities Board both perceived the anticompetitive impact of U S WEST's withdrawal of Centrex service.³¹ The South Dakota Public Utilities Commission and the Colorado Public Utilities Commission each recognized the U S WEST action as an attempt to circumvent the carrier's statutory resale obligations.³² TRA urges the Commission to do the same here.

The Nebraska PSC *Opinions and Findings* which authorize the withdrawal by U S WEST of Centrex Plus service in the State of Nebraska "constitute a 'legal requirement' under Section 253(a)."³³ That "legal requirement" hinders competition, materially inhibiting the ability of resale carriers, particularly smaller resale providers, from competing against U S WEST for small

³⁰ McLeodUSA Telemanagement, Inc. v. U S WEST Communications, Inc. (Opinion and Findings), Dockets FC- 1252, FC-1253, FC-1254, 7 - 8 (Neb. PSC Nov. 25, 1996); McLeodUSA Telemanagement, Inc. v. U S WEST Communications, Inc., Docket Nos. FCU-96-1, FCU-96-3 (Iowa UB June 14, 1996).

³¹ Transmittal No. 96-007-PL, a Price List Filing Relating to its Centrex Plus and Centraflex 2 Service, submitted by U S WEST Communications, Inc., No. UT 126/UM 790, Order No. 96-067 (Oregon PUC Mar. 7, 1996).

³² Application of U S WEST Communications, Inc., Docket No. T96-023 (South Dakota PUC Aug. 22, 1996); Investigation and Suspension of Tariff Sheets Filed by U S WEST Communications, Inc. with Advice Letter No. 2578 Regarding the Discontinuance of Offering Centrex Plus to New Customers, Docket Nos. 96S-071T, 96A-051T (ALJ/Colorado PUC Sept. 3, 1996).

³³ Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995 (Memorandum Opinion and Order), 13 FCC Rcd. 3460 at ¶ 219.

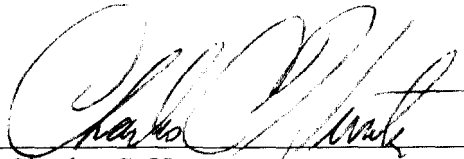
business customers in the State of Nebraska. As such, the Commission should, and indeed, is obligated to, remove this legal requirement under Section 253.

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to issue, as requested by McLeodUSA Telecommunications Services, Inc., a "declaratory ruling and accompanying injunction, ordering that the parts of the Order of the Public Service Commission of Nebraska dated November 25, 1996, Docket No. FC-1252, FC-1253 and FC-1254 which allow the withdrawal by U S WEST of Centrex Plus service, violate and are preempted by 47 U.S.C. § 251(c)(4)(B) and are therefore null and void."³⁴

Respectfully submitted,

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July 10, 1998

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CERTIFICATE OF SERVICE

I, Kim Bounds, hereby certify that a true and correct copy of the foregoing document has been served by United States First Class Mail, postage prepaid, this 10th day of July, 1998 on the individuals shown on the following service list.


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